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Abusive Litigation In Georgia: Deterrence and Compensation

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ABUSIVE LITIGATION IN GEORGIA: DETERRENCE AND COMPENSATION

INTRODUCTION

During 1986, in one week, two changes took effect in Georgia law which altered the way litigants file and pursue lawsuits. First, on June 24, 1986, the Georgia Supreme Court created a new common law tort called "abusive litigation" in *Yost v. Torok*.[1] Second, O.C.G.A. § 9-15-14,[2] enacted by the Georgia General Assembly, became effective on July 1, 1986. The newly adopted statute permits courts to assess attorney's fees and expenses of litigation against a party asserting a frivolous legal position. The *Yost* decision adopted the test for liability found in O.C.G.A. § 9-15-14[3] and extended the remedies for wrongful use of civil process by merging and redefining the torts of malicious use and malicious abuse of legal process.[4] The court titled the new tort "abusive litigation,"[5] now often referred to as a "Yost claim." As a result of these changes, Georgia appears to have moved away from a policy favoring open access to the courts[6] and toward a policy of more restric-

1. Yost v. Torok, 256 Ga. 92, 344 S.E.2d 414 (1986), *aff'g* 176 Ga. App. 149, 335 S.E.2d 419 (1985).

2. O.C.G.A. § 9-15-14 (Supp. 1987). Section 9-15-14 applies "to actions filed or presented for filing on or after July 1, 1986" and "to any action pending on July 1, 1986, with respect to any claim, defense, or other position which is first raised in the action on or after July 1, 1986." HB 1146, as passed, 1986 Ga. Gen. Assem., 1986 GEORGIA HOUSE JOURNAL 2504.

3. *Yost*, 256 Ga. at 96, 344 S.E.2d at 417. The case was decided on June 25, 1986, after the enactment of O.C.G.A. § 9-15-14 by the Georgia General Assembly on March 7, 1986.

4. *Yost* at 95, 344 S.E.2d at 417.

5. *Id.*

6. For an example of a court explaining the open access policy, see Tarver v. Wills, 174 Ga. App. 550, 552, 330 S.E.2d 896, 899 (1985) affirming summary judgment for an attorney and against a doctor in the latter's malicious use of process suit. The doctor failed to prove special damages or malice. According to the court, "[t]he overriding public policy of maintaining free access to the courts, as a fundamental component of our judicial system, requires that 'courts should be open to litigants for the settlement of their rights without fear of prosecution for calling upon the courts to determine such rights.'" *Id.* (quoting Schunk v. Zeff, 109 Mich. App. 163, 311 N.W.2d 322 (1981)). *See also* Dixie Broadcasting Corp. v. Rivers, 209 Ga. 98, 108, 70 S.E.2d 734, 742 (1952) (defendants entitled to bring action against plaintiff's construction of radio broadcasting station). In *Dixie*, the court declared that:

tive use of the judicial system.[7] To effectuate the latter policy, the law has attempted to balance two competing interests. The first interest is deterrence of frivolous claims and dilatory litigation tactics; the second is compensation of the injured litigant.[8]

Georgia's supreme court and legislature approached the problem of frivolous litigation with differing emphasis. The resulting changes in the law have raised potential problems which must be weighed against the possible advantages of curbing frivolous litigation. This Note addresses the ramifications of the recent legislative and common law changes and analyzes the positive and negative effects of these changes.

I. O.C.G.A. § 9-15-14: LEGISLATIVE REMEDY

A. Statutory Language

On March 7, 1986, the Georgia General Assembly passed House Bill 1146,[9] which is codified at O.C.G.A. § 9-15-14. The new law

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> To sustain this [malicious use of process] action against [appellants] for doing that which the law of this State declares they could do without liability, would undermine respect for and confidence in the law of the land. It is a serious matter to establish by decision of this court a rule whereby one may conform to the requirements of the law and yet be subject to payment of damages for his actions thus within the law.

Id. See also Medoc Corp. v. Keel, 152 Ga. App. 684, 687-88, 263 S.E.2d 543, 546 (1979). The *Medoc* court quoted an earlier opinion explaining the policy favoring open access to the courts:

> The constitutional right to appeal to the courts authorizes a fair and legitimate testing of one's bona fide claim of right. A litigant is not subject to be penalized by the award of damages whenever he loses his case. Otherwise every man would enter the doors of the court-house, no matter how honestly or with what probable cause, with the danger of damages hanging over him . . . . There is no law by which every case brought by a plaintiff can be turned into a damage suit by the defendant against the plaintiff for bringing it, while it is still pending.

Id. (citation omitted) (quoting Fender v. Ramsey & Phillips, 131 Ga. 440, 442-43, 62 S.E. 527, 528 (1908)).

7. *See Yost*, 256 Ga. at 92, 93, 344 S.E.2d at 415.

8. *See generally Yost*, 256 Ga. at 92, 344 S.E.2d at 414; *see also* Note, *Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis*, 88 YALE L.J. 1218, 1220 (1979) [hereinafter Note, *Groundless Litigation*].

9. HB 1146, as passed, 1986 Ga. Gen. Assem. O.C.G.A. § 9-15-14 provides:

> (a) In any civil action in any court of record of this state, reasonable and necessary attorney's fees and expenses shall be awarded to any party against whom another party has asserted a claim, defense, or other position with respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim, defense, or other position. Attorney's fees and expenses so awarded shall be assessed against the party

became effective July 1, 1986, and provides in part that "in any civil action," a court shall award "reasonable and necessary attorney's fees and expenses of litigation" against another party who has "asserted a claim, defense, or other position with respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim, defense or other position."[10] Damages can be assessed against the attorney, the party, or both.

Section 9-15-14(b) provides that an award of damages may be made "upon the motion of any party or the court itself."[11] An award is made when:

> [A]n action, or any part thereof, [was brought] that lacked substantial justification or that the action, or any part thereof, was interposed for delay or harassment, or if [the court] finds that

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asserting such claim, defense, or other position, or against that party's attorney, or against both in such manner as is just.

(b) The court may assess reasonable and necessary attorney's fees and expenses of litigation in any civil action in any court of record if, upon the motion of any party or the court itself, it finds that an attorney or party brought or defended an action, or any part thereof, that lacked substantial justification or that the action, or any part thereof, was interposed for delay or harassment, or if it finds that an attorney or party unnecessarily expanded the proceeding by other improper conduct, including, but not limited to, abuses of discovery procedures available under Chapter 11 of this title, the 'Georgia Civil Practice Act.' As used in this Code section, 'lacked substantial justification' means substantially frivolous, substantially groundless or substantially vexatious.

(c) No attorney or party shall be assessed attorney's fees as to any claim or defense which the court determines was asserted by said attorney or party in a good faith attempt to establish a new theory of law in Georgia if such new theory of law is based on some recognized precedential or persuasive authority.

(d) Attorney's fees and expenses of litigation awarded under this Code section shall not exceed amounts which are reasonable and necessary for defending or asserting the rights of a party.

(e) Attorney's fees and expenses under this Code section may be requested by motion within 45 days after the final disposition of the action.

(f) An award of reasonable and necessary attorney's fees or expenses of litigation under this Code section shall be determined by the court without a jury and shall be made by an order of court which shall constitute and be enforceable as a money judgment.

(g) This Code section shall be repealed effective July 1, 1989, and shall not apply to claims, defenses, or other positions first raised thereafter but shall continue to apply to claims, defenses, and positions first raised prior to said date.

Id.

10. O.C.G.A. § 9-15-14(a) (Supp. 1987).
11. O.C.G.A. § 9-15-14(b) (Supp. 1987).

> an attorney or party unnecessarily expanded the proceeding by other improper conduct, including, but not limited to, abuses of discovery procedures available under Chapter 11 of this title, the 'Georgia Civil Practice Act."[12]

The Code defines an action lacking in substantial justification as one which is "substantially frivolous, substantially groundless, or substantially vexatious."[13]

Other provisions of section 9-15-14 establish limits and procedures. "[G]ood faith attempt[s] to establish a new theory of law in Georgia if such new theory of law is based on some recognized precedential or persuasive authority" will not give rise to an assessment of attorney's fees.[14] The amounts awarded are limited to those "reasonable and necessary for defending or asserting the rights of a party."[15] A party seeking an award must file a "motion within 45 days after the final disposition of the action";[16] and the award is determined "by the court without a jury."[17]

B. Interpretation of Section 9-15-14

Having described what O.C.G.A. § 9-15-14 says, the more important task of discerning its meaning, intent, and purpose remains. As a general rule, litigants may not recover attorney's fees or expenses of litigation unless recovery is "provided for by contract or by statute."[18] However, in addition to section 9-15-14, attorney's fees are recoverable under O.C.G.A. § 13-6-11 in cases of "stubborn litigiousness." This statute limits relief to plaintiffs against a defendant's litigious harassment. A defendant has no claim for relief against a plaintiff's excessive litigiousness unless the defendant's counterclaim is independent of the assertion that the plaintiff is stubbornly litigious.[19] Additionally, the award of attorney's fees for a cause of action arising in tort is made by a jury under section 13-

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12. *Id.*
13. *Id.*
14. O.C.G.A. § 9-15-14(c) (Supp. 1987).
15. O.C.G.A. § 9-15-14(d) (Supp. 1987).
16. O.C.G.A. § 9-15-14(e) (Supp. 1987).
17. O.C.G.A. § 9-15-14(f) (Supp. 1987).
18. *E.g.*, Hickman v. Frazier, 128 Ga. App. 552, 197 S.E.2d 441 (1973).
19. O.C.G.A. § 13-6-11 (Supp. 1987). *E.g.*, Florida Rock Indus. v. Smith, 163 Ga. App. 361, 363, 294 S.E.2d 553, 555 (1982). The court stated that "[a]ppellant does not have viable independent counterclaims asserting claims for relief independent of the assertion of the [appellees'] harassment, litigiousness and bad faith in bringing their suits. Thus, appellant is not a true plaintiff in counterclaim so as to claim litigation expenses under [section 13-6-11] . . . ."

6-11.[20] On the other hand, section 9-15-14 provides that the judge determines liability and the amount of the award.[21]

In section 9-15-14, the General Assembly created an additional source for recovery of attorney's fees and made it possible for all parties to a lawsuit to recover for the excessive litigiousness of opposing parties. As a result, all litigants must exercise greater caution in the conduct of litigation and plaintiffs wishing to utilize the courts must evaluate the merits of their cases with greater scrutiny.

Under section 9-15-14(a), attorney's fees and expenses of litigation may be assessed against parties or their attorneys, or both.[22] Monetary sanctions are a strong deterrent to frivolous lawsuits. However, imposition of sanctions does not affect the merits of the case as does a dismissal or default judgment.[23] Therefore, appellate courts are more inclined to uphold monetary sanctions than the harsher sanctions of dismissal or default judgments, and trial courts are afforded greater discretion with monetary sanctions.[24] The use of monetary sanctions directly against attorneys—as opposed to parties—has been encouraged by commentators as an effective method of reducing frivolous lawsuits and controlling litigation abuses.[25] This method is particularly effective when it is the attorney's conduct, and not the client's, which results in sanctions.[26]

The assessment of attorney's fees under section 9-15-14, however, can be counterproductive. Potential sanctions can lead to tension and animosity between opposing counsel, attorneys and

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20. Sun v. Langston, 170 Ga. App. 60, 62, 316 S.E.2d 172, 175 (1984) ("[A] claim under O.C.G.A. § 13-6-11 for expenses of litigation due to the stubborn litigiousness or bad faith of the plaintiff is available to a defendant in a proper case, '[i]n causes of action arising ex delicto, damages including attorney fees can only be awarded by a jury.' " (quoting McCarthy v. Holloway, 245 Ga. 710, 711, 267 S.E.2d 4, 4 (1980))).

21. O.C.G.A. § 9-15-14(f) (Supp. 1987).

22. O.C.G.A. § 9-15-14(a) (Supp. 1987).

23. *See generally* Sofaer, *Sanctioning Attorneys for Discovery Abuse Under the New Federal Rules: On the Limited Utility of Punishment*, 57 ST. JOHN'S L. REV. 680, 706-10 (1983). Sofaer specifically discusses discovery abuses by attorneys, as opposed to the broader topic of frivolous litigation. However, the rationale favoring the use of monetary sanctions to deter abuses is applicable to section 9-15-14. *See also* Note, *Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process*, 44 U. CHI. L. REV. 619 (1977) (discussing efficacy of sanctions).

24. Sofaer, *supra* note 23, at 709 (citing Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 n.14 (1980)) ("The due process concerns posed by an outright dismissal are plainly greater than those presented by assessing counsel fees against lawyers.").

25. *See* Sofaer, *supra* note 23.

26. *Id.* at 710.

their clients, and attorneys and judges.[27] Additionally, court time and expense is consumed hearing the motions for a section 9-15-14 claim.[28] However, the disadvantages of the statute should be minimal if the deterrent effect of section 9-15-14 succeeds in minimizing the number of frivolous or abusive claims.

By extending the reach of section 9-15-14 sanctions to attorneys, the Georgia legislature advances several policies underlying O.C.G.A. Title 9, the Georgia Civil Practice Act. O.C.G.A. § 9-11-11[29] requires an attorney to submit pleadings subject to a "moral and professional obligation of honesty and good faith."[30] There must be "good grounds to support the allegations" in the pleadings, and they must not be interposed for delay.[31] However, section 9-11-11 has been used infrequently by the Georgia courts to sanction attorney misconduct.[32] Section 9-15-14(b) supplements and strengthens the good faith pleadings requirement of section 9-11-11 by prohibiting litigation "interposed for delay."

The legislature's decision to give courts the power to invoke sanctions under section 9-15-14 *sua sponte*, increases the ability of the courts to control discovery abuses. Under O.C.G.A. § 9-11-26(b)(1),[33] judges have the discretionary power to protect parties from "annoyance, embarrassment, or oppression."[34] Under the new statute, judges may now impose monetary sanctions against attorneys engaging in abusive discovery. The combination of these two Code sections gives judges the power to protect innocent parties, compensate injured parties, and deter future abuses. But this power will also have the corresponding effect of inhibiting aggressive discovery sought by an attorney zealously representing a client within the bounds of the law.[35]

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27. *Id.* at 716.

28. *See id.*

29. O.C.G.A. § 9-11-11 (1982) (Section 9-11-11 requires that at least one attorney of record or a party, if not represented by an attorney, sign his name and state his address on every pleading. "The signature of an attorney constitutes a certificate by him that he has read the pleading and that it is not interposed for delay." O.C.G.A. § 9-11-11(a) (1982)).

30. O.C.G.A. § 9-11-11 (1982). *See* North Ga. Prod. Credit Ass'n v. Vandergrift, 239 Ga. 755, 763, 238 S.E.2d 869, 875 (1977).

31. *Id.*

32. *See* Lee v. Precision Balancing and Mach., Inc., 134 Ga. App. 762, 764, 216 S.E.2d 640, 642 (1975).

33. O.C.G.A. § 9-11-26(b)(1) (1982 & Supp. 1987).

34. *E.g.*, Anderberg v. Georgia Elec. Membership Corp., 175 Ga. App. 14, 17, 332 S.E.2d 326, 328 (1985) (quoting Jackson v. Gordon, 122 Ga. App. 657, 178 S.E.2d 310 (1970)).

35. *See* 1986-87 STATE BAR OF GEORGIA HANDBOOK EC 7-1 [hereinafter HANDBOOK].

In addition to the statute's deterrence against discovery abuses, section 9-15-14 provides the parties to a lawsuit with an alternative form of relief. O.C.G.A. § 9-11-37(d) provides that a party can move for sanctions without a prior motion to compel discovery when the opposing party fails to answer interrogatories, respond to requests for production of documents, or attend a noticed deposition.[36] The available sanctions under section 9-11-37(d) include striking the offending party's pleadings,[37] granting a dismissal or default judgment,[38] or awarding attorney's fees and reasonable expenses.[39] Additionally, a party may seek a court order to compel discovery.[40] Failure to comply with the court order can result in those sanctions which the court deems just.[41]

To the extent that section 9-15-14 assesses attorney's fees and expenses against a party abusing discovery, the new Code provision partially duplicates the remedy available under section 9-11-37. As a result, litigants can utilize alternative statutory provisions to remedy discovery abuses. Although the scope of the remedy is narrower under section 9-15-14, its language is more expansive than that found in section 9-11-37.[42]

Section 9-15-14 both supplements and provides an alternative to prior existing statutory sources designed to deter abusive litigation tactics. The unique language of section 9-15-14 sets it apart from the other statutes. The new Code provision adopts an objective standard of reasonableness to determine the need to assess attorney's fees and expenses.[43] The statute's objective test is measured

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36. O.C.G.A. § 9-11-37(d) (1982 & Supp. 1987).

37. O.C.G.A. § 9-11-37(b)(2)(c) (Supp. 1987).

38. *Id. See also* Carter v. Merrill Lynch, Pierce, Fenner and Smith, 130 Ga. App. 522, 524, 203 S.E.2d 766, 767 (1974) (party's misconduct must be "wilful" or a "conscious indifference to consequences" to support the sanction of default).

39. O.C.G.A. § 9-11-37(b) (Supp. 1987). *See, e.g.*, Sneider v. English, 129 Ga. App. 638, 200 S.E.2d 469 (1973).

40. O.C.G.A. § 9-11-37(a) (Supp. 1987).

41. O.C.G.A. § 9-11-37(b) (Supp. 1987); Swindell v. Swindell, 233 Ga. 854, 213 S.E.2d 697 (1975).

42. The caption for O.C.G.A. § 9-11-37 is "Failure to make discovery; motion to compel; sanctions; expenses." The Code section encompasses "failures" to comply with discovery requests. Affirmative discovery abuses are dealt with more generally under section 9-11-26.

43. The Code provides:

> In any civil action . . . reasonable and necessary attorney's fees and expenses of litigation shall be awarded to any party against whom another party has asserted a claim, defense, or other position with respect to which there existed such a complete absence of any justiciable issue of law or fact that it *could not be reasonably believed* that a court would accept the

from the perspective of the party asserting the allegedly abusive "claim, defense, or other position."[44] The statute does not consider the subjective intent of the attorney or party. Wilfulness is not the standard; rather, the negligent assertion of a legal position when "there existed . . . a complete absence of any justiciable issue of law or fact" is actionable under the statute.[45]

Section 9-15-14(b) further defines conduct which can result in sanctions for groundless litigation. First, any action brought or defended "that lacked substantial justification"[46] may be sanctioned. As previously mentioned, "lacked substantial justification" is defined in the Code as "substantially frivolous, substantially groundless, or substantially vexatious."[47] However, this elucidation is of little help because the word "substantially" is not defined by the legislature. According to *Webster's Dictionary*,[48] "substantial" is defined as "of or having substance; real, actual, true, not imaginary, . . . with regard to essential elements." "Substantially" is also defined as "essentially; without material qualification."[49]

A second instance of misconduct sanctionable under section 9-15-14(b) involves trial tactics "interposed for delay or harassment."[50] The statute's language is analogous to that of Rule 11 of the Federal Rules of Civil Procedure.[51] Rule 11 permits the assessment of attorney's fees and costs by a showing of an improper pur-

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asserted claim, defense, or other position.

O.C.G.A. § 9-15-14(a) (Supp. 1987) (emphasis added).

44. *Id.*

45. *Id. Cf.* Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 195 (1985). The language, intent, and proposed effects of § 9-15-14 are closely analogous to those of Federal Rule 11. Schwarzer maintains that Rule 11 operates on an objective basis and that the attorney's subjective intent is irrelevant in determining a violation of the rule.

46. O.C.G.A. § 9-15-14(b) (Supp. 1987).

47. O.C.G.A. § 9-15-14(b) (Supp. 1987); *see supra* text accompanying note 13.

48. WEBSTER'S NEW WORLD DICTIONARY 1420 (2d College ed. 1980).

49. BLACK'S LAW DICTIONARY 1281 (5th ed. 1979).

50. O.C.G.A. § 9-15-14(b) (Supp. 1987).

51. Rule 11 provides:

> The signature by an attorney or party constitutes a certificate by him . . . that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

FED. R. CIV. P. 11. Federal Rule of Civil Procedure 11 was amended in 1983 and partially rewritten with broader language to encourage the imposition of sanctions. The Georgia Civil Practice Act and O.C.G.A. § 9-11-11 have not adopted the new language.

pose, such as delay.[52] The stated intent of Rule 11 is to impose sanctions for motion and pleading abuses in order to discourage abusive and dilatory tactics and to streamline litigation by reducing frivolous claims or defenses.[53] Because the language, intent, and effect of Rule 11 are closely related to section 9-15-14(b), an understanding of the case law interpretation of Rule 11 is helpful in arguing a section 9-15-14 motion for attorney's fees.[54]

The third instance giving rise to section 9-15-14 sanctions occurs when "an attorney or party [has] unnecessarily expanded the proceeding by other improper conduct."[55] Whereas the preceding clause in section 9-15-14(b) refers to an attorney or party interposing an action, which is an affirmative act, this clause is much broader. Proceedings can be unnecessarily expanded due to acts of omission or commission. Acts of commission include unwarranted counterclaims, cross-claims, joinder of parties, joinder of claims, and the impleading of third parties. Acts of omission could include failing to do things which would expedite the proceedings. The clause prohibiting other improper conduct is in addition to the restriction against procedural motions which are made with a "complete absence of any justiciable issue of law or fact."[56] In addition to frivolous pleadings and motions, discovery abuses are specifically included in section 9-15-14 and may be sanctioned if these abuses "unnecessarily expand the proceedings."[57]

Bad faith settlement negotiations also should be encompassed by the section 9-15-14(b) prohibition against unnecessarily expanding the proceedings.[58] Unlike the Federal Rules of Civil Procedure, Georgia's Civil Practice Act does not include a rule sanctioning bad faith refusals of settlement offers.[59] Liberal use of section 9-15-

52. *E.g.*, McLaughlin v. Western Casualty and Sur. Co., 603 F. Supp. 978 (S.D. Ala. 1985).

53. 97 F.R.D. 165, 198 (1983) (advisory committee notes).

54. A. Jenkins, *Yost v. Torok*, Abusive Litigation and Rule 11 Sanctions: An Overview 21 (1986) (unpublished manuscript) (copy on file at *Georgia State University Law Review* office) [hereinafter Jenkins].

55. O.C.G.A. § 9-15-14(b) (Supp. 1987).

56. O.C.G.A. § 9-15-14(a) (Supp. 1987).

57. O.C.G.A. § 9-15-14(b) (Supp. 1987).

58. The *Yost* court interpreted the phrase "claim, demand, or other position," which was adopted from the statute for the tort, to include "any offers of settlement or compromise . . . ." *Yost*, 256 Ga. at 96, 344 S.E.2d at 418.

59. *But see* O.C.G.A. § 51-12-14 (1982), which provides a procedure enabling a claimant to recover interest following a demand for unliquidated damages, if the claimant prevails in the action. FED. R. CIV. P. 68 provides that if a plaintiff fails to accept an offer of settlement, properly served by the defendant, "and the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must

14(b) may reduce protracted litigation, unduly delayed by refusals of good faith settlement offers or offers of judgment.

C. *Legislative History*

The meaning of section 9-15-14 can be deduced by analogy to other Georgia statutes and various federal provisions, but the scope of the new Code provision and the breadth of its language can be ascertained more directly from its legislative history. The history surrounding the enactment of section 9-15-14 implies that the statute should be construed broadly to achieve the drafters' intent.

During the 1986 General Assembly, the Georgia Legislature sought new solutions for the problems caused by frivolous lawsuits. Both the House and Senate drafted proposals, but their proposals differed greatly. The Senate bill, proposed by Lieutenant Governor Zell Miller, would have required the loser of a civil lawsuit to pay, subject to certain exceptions, the winner's attorney's fees and court costs.[60] The Senate, in effect, proposed the elimination of the "American Rule" and adoption of the "English Rule."[61] The measure would have been the only one of its kind in the United States

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pay the costs incurred after the making of the offer."

> [The rationale underlying Rule 68 is] to encourage settlements and avoid protracted litigation by taxing a claimant with costs if he should recover no more after trial than would have been received if the claimant had accepted the defending party's offer to enter judgment in the claimant's favor for a specified amount of money or property, or other relief.

102 F.R.D. 407, 433 (1985) (committee note to proposal to amend Rule 68).

60. SB 434, as introduced, 1986 Ga. Gen. Assem. *See generally* Sentell, *Georgia Local Government Tort Liability: The "Crisis" Conundrum*, 2 GA. ST. U.L. REV. 19 (1985); Hansen, *Showdown Shapes Up Over Push To Make Loser Of Civil Suits Pay Costs*, Atlanta Const., Jan. 24, 1986, at A10, col. 4; Miller, *Making Loser Pay Litigation Costs Can Ease Logjam, Liability Problems*, Atlanta J. & Const., Jan. 26, 1986, at D6, col. 1; Riner, *41 Senators Support 'Two-Times-A-Loser' Insurance Measure*, Atlanta Const., Jan. 28, 1986, at A26, col. 1; Miller, *Having Losing Parties Pay Court Costs Not A Quick Fix*, Atlanta Const., Feb. 17, 1986, at A8, col. 3.

61. The English Rule provides that the loser of a lawsuit pays the winner's attorney's fees and court costs. The rule has never been adopted in the United States. The United States Supreme Court specifically has refused to change American common law to the English Rule absent some legislative guidance. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975). For an article proposing adoption of the English Rule, see Figa, *The 'American Rule' Has Outlived Its Usefulness; Adopt the 'English Rule,'* NAT. L.J., Oct. 20, 1986, at 13 (the English Rule used in the context of attorney's fees is to be distinguished from the English Rule in malicious use of process, which requires the plaintiff to prove special damages as part of the prima facie case).

if it had been adopted.[62] The purpose of the Senate bill was to effect tort reform[63] and create greater judicial economy and efficiency,[64] thus reducing "skyrocketing" liability insurance premiums.[65]

The bill introduced in the House of Representatives was more limited than the Senate version. The House version would have permitted the assessment of attorney's fees and expenses of litigation when a court in its sound discretion determined that a party filed or pursued a frivolous lawsuit.[66]

The House passed its version by a wide margin,[67] and then submitted it for Senate consideration. However, the Senate desired to enact its own bill and did not pass the House version.[68] Likewise, the House refused to pass the Senate's bill which had passed the Senate and was submitted to the House for consideration.[69] Consequently, a conference committee was appointed by the House and Senate leadership to reach a compromise.[70]

The committee proposed a compromise bill[71] which passed in both houses.[72] Upon the Governor's signature, the compromise became the current O.C.G.A. § 9-15-14. The final enactment differs substantially from the original House version and reflects the Senate's influence in reaching a compromise.

The final version of section 9-15-14 allows either mandatory[73] or discretionary[74] awards of attorney's fees and expenses. The original bill proposed in the House of Representatives only provided for discretionary award of attorney's fees and expenses.[75] Use of the

62. Hansen, *Showdown Shapes Up Over Push To Make Loser Of Civil Suits Pay Costs*, Atlanta Const., Jan. 24, 1986, at A10, col. 5.

63. *Senate Panel Alters House Bill On Frivolous Suits*, Atlanta J., Feb. 19, 1986, at D1, col. 5.

64. Miller, *Making Loser Pay Litigation Costs Can Ease Logjam, Liability Problems*, Atlanta J. & Const., Jan. 26, 1986, at D6, col. 1.

65. Riner, *41 Senators Support 'Two-Times-A-Loser' Insurance Measure*, Atlanta Const., Jan. 28, 1986, at A26, col. 1.

66. HB 1146, as introduced, 1986 Ga. Gen. Assem. *See* 1986 GEORGIA HOUSE JOURNAL 18.

67. 1986 GEORGIA HOUSE JOURNAL 222 (the House passed HB 1146 by a margin of 141 to 8).

68. *Id.* at 1463.

69. *Id.* at 1581.

70. *Id.* at 1676, 1751.

71. *Id.* at 2502.

72. *Id.* at 2504, 2607.

73. O.C.G.A. § 9-15-14(a) (Supp. 1987).

74. O.C.G.A. § 9-15-14(b) (Supp. 1987).

75. HB 1146, as introduced, 1986 Ga. Gen. Assem. *See* 1986 GEORGIA HOUSE JOUR-

stronger word "shall" in section 9-15-14(a) seems to demonstrate the legislature's intent that sanctions be utilized by the court whenever a violation of the statute occurs. Courts should not be reluctant, therefore, to impose sanctions given the proper set of facts. The deterrent effect of section 9-15-14 should be substantial. The compromise bill's substitution of the word "shall" for "may" also illustrates the influence of the Senate proposal, which would have required the loser of the lawsuit to pay attorney's fees and expenses in every case.[76]

The compromise bill inserted the word "defense" and expanded the reach of the statute to the assertion of any "claim, 'defense,' or other position."[77] The original House proposal did not cover the assertion of frivolous defenses.

Paragraphs (b) and (c) of section 9-15-14 were conference committee additions to the original House bill. These additions essentially broadened and strengthened the statute's language, provided the court with additional discretion, and made an allowance for good faith claims.[78]

The enacted statute strikes a balance between deterring frivolous suits and encouraging aggressive litigation. The discretionary bill proposed by the House would have focused on the extent of harm caused to the litigant in determining liability or damages. The Senate's proposed "English Rule" was clearly a deterrent measure, one which did not concern itself with the extent of damage incurred by any of the parties.[79] An increase in judicial economy and efficiency[80] and a decrease in liability insurance premiums[81] were the purposes underlying the Senate bill. The final version of section 9-15-14 merged the deterrence and compensatory aspects of the two proposals into one bill.

D. Potential Problems

Section 9-15-14 creates some unanswered questions which may detract from its effectiveness. For example, when is a party re-

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NAL 2503.

76. *Id.* at 1581.

77. *Id.*

78. *See* O.C.G.A. § 9-15-14(b), (c) (Supp. 1987). *See supra* text accompanying notes 46-59.

79. *See* Figa, *supra* note 61; Sofaer, *supra* note 23, at 726 (American Rule is greatest cause of discovery abuse).

80. *See supra* note 64.

81. *See supra* note 65.

quired to file a motion for attorney's fees and expenses under the statute? The statute provides that the motion is to be filed "within 45 days after the final disposition of the action."[82] However, it is unclear whether final disposition refers to a judgment rendered by the trial court or to the outcome of any appeals.[83]

The potential success of a section 9-15-14 motion will not be certain until all appeals are decided. Does section 9-15-14 apply to frivolous appeals? A Georgia court has the power under section 5-6-6 to assess damages for the filing of a frivolous appeal;[84] however, the court is limited to those situations in which the trial court has entered a judgment for a sum certain.[85] An award under section 5-6-6 is limited to ten percent of the trial court judgment. On the other hand, section 9-15-14 applies to specified misconduct "in any civil action."[86] If "final disposition of the action" is to include appeals, thus precluding the filing of a motion for sanctions until conclusion of any appeals, then all appeals should be included within the language "in any civil action." Thus, a litigant would have two alternatives when seeking damages for a frivolous appeal: under section 5-6-6 the litigant may seek damages based on a percentage of the underlying trial court judgment or under section 9-15-14 the litigant may seek attorney's fees and expenses without regard to the amount of damages awarded at trial.

Although portions of its language are unclear, section 9-15-14 should provide an effective measure for deterring frivolous lawsuits and abusive litigation tactics. The meaning of the language in section 9-15-14 can be ascertained by analogy to other Georgia statutes and to the Federal Rules of Civil Procedure. The intended scope and reach of section 9-15-14 can be inferred from the legislative history, which indicates that the new Code provision is to be read broadly. For certain violations courts "shall" assess sanctions, and when the court acts in its discretionary capacity its findings should be accorded great deference on appeal. Furthermore, in an effort to deter abuses, sanctions should be assessed when a violation occurs and not just when a litigant incurs additional fees and costs as a result of abusive litigation.

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82. O.C.G.A. § 9-15-14(e) (Supp. 1987).

83. *See* Jenkins, *supra* note 54, at 14.

84. O.C.G.A. § 5-6-6 (1982).

85. *E.g.*, Shepherd v. Epps, 242 Ga. 322, 249 S.E.2d 33 (1978); Jackson v. Jackson, 178 Ga. 203, 172 S.E. 459 (1934).

86. O.C.G.A. § 9-15-14(a), (b) (Supp. 1987).

II. *Yost v. Torok:* JUDICIAL REMEDY FOR ABUSIVE LITIGATION

In addition to the recent legislative assault on frivolous lawsuits in Georgia, the state's supreme court has created a new common law tort to deter abusive legal tactics and to compensate injured litigants. In *Yost v. Torok*, the supreme court merged and redefined the common law torts of malicious use and malicious abuse of legal process into a single new tort called "abusive litigation."[87] The court adopted substantial portions of the language of section 9-15-14 to establish the test of liability for the new tort.[88] However, the tort operates in a different procedural manner and provides different remedies than does section 9-15-14.[89] As a result, the potential for numerous problems has been created which weighs against the possible effectiveness of the *Yost* decision.

The *Yost* decision markedly illustrates a shift in policy within the Georgia legal system away from open access to the courts. Formerly, a party subjected to abusive litigation could ordinarily gain relief only by asserting a claim for malicious use or malicious abuse of process.[90] Although the prima facie elements for these torts[91] are the same in most jurisdictions, the requirement for proving special damages in a malicious use of process claim varies. A minority of states,[92] formerly including Georgia,[93] require the plaintiff to prove special damages to support a malicious use of process claim. The Restatement rule, followed in a majority of jurisdictions, does not have a special damage requirement.[94]

The rationale for the special damages requirement is to allow honest litigants open access to the courts to seek redress without

87. Yost v. Torok, 256 Ga. 92, 95, 344 S.E.2d 414, 417 (1986).

88. *Id.* at 96, 344 S.E.2d at 417.

89. *Id.* at 96, 344 S.E.2d at 418.

90. *E.g.*, Dixie Broadcasting Corp. v. Rivers, 209 Ga. 98, 105, 70 S.E.2d 734, 740 (1952).

91. *E.g.*, Ferguson v. Atlantic Land & Dev. Corp., 248 Ga. 69, 71-72, 281 S.E.2d 545, 547-48 (1981) (malicious use of process has three required elements: malice, lack of probable cause, and termination of the proceeding in favor of the defendant; malicious abuse of process has two required elements: existence of an ulterior purpose and unlawful or wrongful use of the process after it is instituted).

92. *See generally* Partridge, Wilkinson, & Krause, *A Complaint Based On Rumors: Countering Frivolous Litigation*, 31 LOY. L. REV. 221, 248 (1985) [hereinafter *Frivolous Litigation*]; Note, *Liability for Proceeding with Unfounded Litigation*, 33 VAND. L. REV. 743, 748 (1980) [hereinafter Note, *Unfounded Litigation*].

93. *E.g.*, Taylor v. Greiner, 247 Ga. 526, 528, 277 S.E.2d 13, 15 (1981); Jacksonville Paper Co. v. Owen, 193 Ga. 23, 25, 17 S.E.2d 76, 78 (1941).

94. *See Frivolous Litigation*, *supra* note 92, at 248; Note, *Unfounded Litigation*, *supra* note 92, at 749.

fear of being sued in return.[95] This line of thought assumes that the victim of a frivolous or malicious lawsuit is sufficiently compensated by an award of costs from the court.[96] Aside from policy differences underlying the two rules, it is clear that the additional requirement of proving some actual damages reduces the number of actionable malicious use of process claims.

The minority position, to which Georgia formerly adhered, restricts the availability of malicious use of process claims and thus encourages free and open access to the courts for plaintiffs.[97] *Yost* reversed this policy.[98] However, following the *Yost* decision, the impediments for filing a claim for wrongful use of civil process have been greatly relaxed, and plaintiffs, including those with valid claims, should now act with much greater caution.

A. Yost v. Torok: *The Underlying Facts*

The factual circumstances of *Yost v. Torok* provided an excellent vehicle for the supreme court to create the new tort of abusive litigation. In *Yost*, the Toroks (husband and wife) sued Yost for personal injuries incurred by Janos Torok in an automobile collision. Yost's answer denied that a collision ever occurred and counterclaimed against the Toroks for malicious abuse of process. Subsequently, the counterclaim was voluntarily dismissed. The Toroks then brought a separate action for malicious abuse of process. They claimed that Yost's counterclaim was filed for the improper purpose of attempting to induce the Toroks to abandon their original suit.[99]

The Georgia Court of Appeals ruled in favor of the Toroks' malicious abuse of process claim, holding that a malicious abuse claim could accrue before the conclusion of the underlying suit when process was perverted during its pendency.[100] Although the court cited no authority in support of its holding, analogous authority exists.[101]

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95. *Frivolous Litigation, supra* note 92, at 249.

96. Note, *Unfounded Litigation, supra* note 92, at 750.

97. *Id.* at 749.

98. *See supra* note 6 and accompanying text.

99. *See* Yost v. Torok, 256 Ga. at 92, 344 S.E.2d at 415; Torok v. Yost, 176 Ga. App. 149, 149-50, 335 S.E.2d 419, 420 (1985). *See also* Hammond & Farnsworth, *Preventing Litigation Abuse - Limited Tort Reform in Georgia*, 30 ATLANTA LAW. 3, 12 (1986) [hereinafter Hammond].

100. *Torok*, 176 Ga. App. at 150, 335 S.E.2d at 421.

101. *See* Medoc Corp. v. Keel, 152 Ga. App. 684, 688-89, 263 S.E.2d 543, 546 (1979) (stating that a "defendant" has a counterclaim for malicious abuse of process when

B. *Georgia Supreme Court Defines A New Tort*

The Georgia Supreme Court granted certiorari in *Yost* to determine whether a plaintiff may have a valid malicious abuse of process cause of action against a defendant employing improper defensive tactics.[102] Additionally, the court heard this case to address larger problems underlying the torts of malicious use and malicious abuse of process.[103] In addressing the inadequacies of the two old common law torts, the supreme court declined to refine further and modify the tort of malicious abuse. Instead, it chose to merge and redefine both malicious use and abuse of civil process into the single new tort of abusive litigation.[104]

The *Yost* court expressed two main concerns with the torts of malicious use and malicious abuse, in the course of reaching its decision. First, the court expressed an interest in preventing "abuse of the judicial process" which the two former torts failed to do.[105] The court specifically referred to the use of "improper defensive tactics . . . designed *not* to discover the truth, but rather to exhaust the claimant."[106] Second, the court expressed concern that the current definition of malicious use and abuse of process had created substantial uncertainty, to the extent that an injured party was at times left without a remedy.[107]

In its analysis of malicious use and malicious abuse of process, the court reviewed the requisite elements of each of the torts. Malicious use of process requires a showing of malice, lack of probable cause, and termination of the proceeding in favor of the defendant.[108] Furthermore, the defendant must show actual harm in the form of arrest, attached property, or other special damages.[109] To

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plaintiff perverts process for an improper legal purpose after suit is filed). *But see* Outlaw v. Transit Homes, 145 Ga. App. 695, 698, 244 S.E.2d 633, 635 (1978); Ferguson v. Atlantic Land & Dev. Corp., 248 Ga. 69, 71, 281 S.E.2d 545, 547 (1981) (defendant's counterclaim for malicious abuse not allowed when plaintiff brought suit without probable cause, but with an appropriate, lawful purpose).

102. *Yost*, 256 Ga. at 94, 344 S.E.2d at 416.

103. *Id.*

104. *Id.* at 95, 344 S.E.2d at 417.

105. *Id.* at 92, 344 S.E.2d at 415.

106. *Id.*

107. *Id.* at 94, 344 S.E.2d at 416.

108. *Id.* at 93, 344 S.E.2d at 415. *See also* Porter v. Johnson, 96 Ga. 145, 23 S.E. 123 (1895); Cooper v. Public Fin. Corp., 146 Ga. App. 250, 254, 246 S.E.2d 684, 688 (1978) (listing elements of malicious use of process tort).

109. *See Yost*, 256 Ga. at 93, 344 S.E.2d at 415. *See e.g.*, Taylor v. Greiner, 247 Ga. 526, 528, 277 S.E.2d 13, 15 (1981); Jacksonville Paper Co. v. Owen, 193 Ga. 23, 25, 17 S.E.2d 76, 78 (1941).

establish malicious abuse of process, the defendant must prove the wrongful and unlawful use of legal process for a purpose not intended by law.[110]

The *Yost* court, dissatisfied with the deterrent and compensatory effects of the torts of malicious use and malicious abuse, outlined their deficiencies. Malicious use claims result in additional expenses and substantial delays to the parties because a subsequent trial is required.[111] Also, malicious use claims are subject to the requirement of termination of the prior proceedings in favor of the defendant. Thus, the Toroks could not bring a malicious use claim because Yost dismissed his counterclaim before it could be adjudicated.[112] In addition, the court could have found that the Toroks, as plaintiffs who initiated the action, had no malicious use cause of action against the defendant Yost.[113]

The court also questioned the validity of the Toroks' malicious abuse claim, stating that the " '[r]egular and legitimate *use* of process,' " even with bad intentions, does not establish a cause of action.[114] However, had the court elected to analyze the narrow issue decided by the Georgia Court of Appeals,[115] it could have found Yost's counterclaim to be a malicious abuse of process. Yost asserted in his answer that no automobile collision occurred, when in fact one had. Therefore, his counterclaim for damages against the Toroks was groundless. A groundless counterclaim cannot obtain its regular and legitimate purpose, which is to compensate the damaged defendant. Therefore, Yost's counterclaim was wilfully misapplied "in order to obtain an objective such process was not intended by law to achieve."[116] Specifically, Yost's counterclaim was intended to induce the Toroks to withdraw their suit.[117] It is significant that the *Yost* court granted certiorari to decide broad

110. *Yost*, 256 Ga. at 93, 344 S.E.2d at 415 (quoting Ferguson v. Atlantic Land and Dev. Corp., 248 Ga. 69, 71, 281 S.E.2d 545, 547 (1981)).

111. *Yost*, 256 Ga. at 93, 344 S.E.2d at 416.

112. *Id. See also* Florida Rock Indus. v. Smith, 163 Ga. App. 361, 362, 294 S.E.2d 553, 554 (1982) (disallowing action when the underlying claim did not terminate in favor of defendant).

113. *See* Sun v. Langston, 170 Ga. App. 60, 61, 316 S.E.2d 172, 174 (1984) (plaintiff did not state a claim for malicious use or malicious abuse because such actions "lie in a showing by the *defendant*").

114. *Yost*, 256 Ga. at 94, 344 S.E.2d at 416 (citing *Ferguson*, 248 Ga. at 71, 281 S.E.2d at 547).

115. *See supra* text accompanying note 100.

116. Cooper v. Public Fin. Corp., 146 Ga. App. 250, 254, 246 S.E.2d 684, 688 (1978) (defining the legal standard for malicious abuse of process).

117. Torok v. Yost, 176 Ga. App. 149, 150, 335 S.E.2d 419, 421 (1985).

issues of law relating to malicious use and malicious abuse of process, while not deciding the narrow issue before the lower court.

C. *Rationale Behind* Yost

The *Yost* court based part of its decision on the proposals of three commentators urging reform of the wrongful use of civil process torts.[118] Utilizing an historical analysis of malicious use and malicious abuse of process, the court adopted the reasoning of one of the commentators[119] and concluded that "the two torts have operated in something of a vacuum . . . ."[120] The original and present purpose of malicious use of process in English common law is to provide remedies for extraordinary abuses that internal sanctions do not deter or compensate.[121] The English internal sanctions, specifically the requirement that the loser of a lawsuit pay the opposing party's attorney's fees and costs, serve as the primary method of deterring frivolous suits.[122]

According to the *Yost* court, the requisite internal sanctions "heretofore have been lacking" in the Georgia court system.[123] Technically, the court was correct only because *Yost* was decided six days before section 9-15-14 became effective. After section 9-15-14 became effective on July 1, 1986, however, stringent internal sanctions were available to Georgia courts and litigants.[124] Imposition of these statutory sanctions "shall" be applied when a specified abuse is shown.[125] The internal sanctions created by the court to deter frivolous litigation are similar to those found in section 9-15-14, although each group of sanctions is less stringent than those of the English system. The victims of frivolous or abusive litigation

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118. *Frivolous Litigation, supra* note 92; Note, *Unfounded Litigation, supra* note 92; Note, *Groundless Litigation, supra* note 8.

119. *Yost*, 256 Ga. at 94, 95 nn. 2 & 4, 344 S.E.2d at 416, 417 nn. 2 & 4. *See also* Note, *Groundless Litigation, supra* note 8, at 1229 (containing same discussion cited in *Yost*).

120. *Yost*, 256 Ga. at 95, 344 S.E.2d at 417.

121. *Id.* at 94 n.2, 344 S.E.2d at 416 n.2 (discussing Note, *Groundless Litigation, supra* note 8, at 1229).

122. *Id.*

123. *Id.* at 95, 344 S.E.2d at 417. The language in West Publication's advance sheets and final version differs from the language in the opinion's official publication. West's version states in paragraph eight: "In our system, however, those internal sanctions presently are lacking." Additionally, the language in West's advance sheets varies from the official opinion in paragraphs two, eight, nine, twelve, thirteen (discussing the applicable legal standard), and fourteen.

124. *See supra* text accompanying notes 61-82.

125. O.C.G.A. § 9-15-14(a) (Supp. 1987).

in Georgia are not left without a remedy as was sometimes the case before the enactment of section 9-15-14. And, under the new statute, the torts of malicious use and malicious abuse of process could have deterred and compensated extraordinary abuses not encompassed by the internal sanction of section 9-15-14.[126]

The *Yost* court acknowledged that section 9-15-14 provides for attorney's fees and expenses of litigation in cases of "specified abusive conduct."[127] Since the *Yost* court adopted the language of section 9-15-14 to define specified misconduct,[128] instances of abusive litigation should be treated similarly under both the new tort and the statute. However, it seems the court did not view section 9-15-14 as enough of an internal sanction. The court failed to give the statute a chance to succeed in curbing abusive litigation.

The commentator who initially urged a reform of the wrongful use of civil process torts proposed two alternatives. The first proposal urged state legislatures to create the needed internal sanctions so that malicious use and malicious abuse of process could deter abusive litigation as intended. In the alternative, the commentator urged courts to create a new tort to operate as a compulsory counterclaim against frivolous lawsuits.[129] The commentator's analysis, upon which the *Yost* court in part based its decision, implies that the creation of the new tort of abusive litigation is unnecessary, given the legislative enactment of section 9-15-14.

Central to the *Yost* decision, was the court's belief that the remedy available under section 9-15-14 "in no way resolves the problems which we have outlined relative to other elements of recovery."[130] Specifically, the court sought a remedy for special damages, including mental distress, resulting from abusive litigation. Previously, absent a showing of special damages, only nominal damages were recoverable.[131] The court's newly created remedy for the tort of abusive litigation greatly expands the scope of recoverable special damages, in order to allow more causes of action than

126. Note, *Groundless Litigation*, *supra* note 8, at 1237.

127. *Yost*, 256 Ga. at 95, 344 S.E.2d at 417.

128. *Id.*

129. Note, *Groundless Litigation*, *supra* note 8, at 1233.

130. *Yost*, 256 Ga. at 95, 344 S.E.2d at 417. The "problems" to which the court referred stem from the inadequacies of the old torts of malicious use and malicious abuse. "In either event, there is injury without remedy." *Id.* at 94, 344 S.E.2d at 416. The court further stated that "[t]he effort to prevent reciprocal and endless controversy has diminished the remedies for abusive litigation." *Id.* (latter quote is worded differently in West Publication's advance sheets).

131. *Yost*, 256 Ga. at 95, 344 S.E.2d at 417.

are permitted under malicious use of process.

Under the old tort of malicious use of process, "damages for embarrassment, mortification, humiliation, and being 'held up to public scorn and ridicule,' do not constitute special damages or injury."[132] The scope of special damages does not include mental anguish.[133] Additionally, lost time from work incurred defending a lawsuit and increases in insurance premiums are not special damages.[134] Generally, some type of physical injury is required to sustain a claim for malicious use of process.[135] Attorney's fees and expenses of litigation are not recoverable for malicious use of process.[136] For malicious abuse of process, no proof of special damages is required.[137]

The barriers to recovery erected by malicious use and malicious abuse of process have been partially removed by the new tort of abusive litigation. O.C.G.A. § 9-15-14 specifically provides for the recovery of attorney's fees and expenses for conduct formerly encompassed by the common law torts. The *Yost* decision went one step further and allowed for recovery of special damages, which previously were not recoverable for groundless litigation.[138] Such damages may include injury to reputation, injury to one's profession or business,[139] mental anguish,[140] and nominal damages. Damages are "determined by the enlightened conscience of an impartial jury" and need not be limited to the actual damages incurred.[141]

Although the *Yost* court expanded the scope of special damages for abusive litigation, it eliminated recovery of punitive damages. The court reasoned that the tort alone is a deterrent, and there-

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132. Dixie Broadcasting Corp. v. Rivers, 209 Ga. 98, 108, 70 S.E.2d 734, 742 (1952) (quoting Jacksonville Paper Co. v. Owen, 193 Ga. 23, 25, 17 S.E.2d 76, 78 (1941)).

133. Greer v. State Farm Fire & Casualty Co., 139 Ga. App. 74, 78, 227 S.E.2d 881, 885 (1976).

134. Tarver v. Wills, 174 Ga. App. 550, 552, 330 S.E.2d 896, 899 (1985).

135. *Greer*, 139 Ga. App. at 79, 227 S.E.2d at 885.

136. *E.g.*, *Dixie*, 209 Ga. at 108, 70 S.E.2d at 742; Georgia Educ. Auth. v. Davis, 227 Ga. 36, 39, 178 S.E.2d 853, 856 (1970).

137. *E.g.*, Torok v. Yost, 176 Ga. App. 149, 151, 335 S.E.2d 419, 421 (1985); *contra* Tapley v. Youmans, 95 Ga. App. 161, 97 S.E.2d 365 (1957) (The *Tapley* court appears to address a malicious use standard in the context of a malicious abuse analysis.).

138. *Yost*, 256 Ga. at 95, 344 S.E.2d at 417.

139. Jenkins, *supra* note 54, at 7; Address by Georgia Supreme Court Justice Charles Weltner, A.B.A. Symposium, in Atlanta (Sept. 26, 1986) (Justice Weltner is the author of *Yost v. Torok*), *reprinted in* Fulton County Daily Rep., Sept. 29, 1986, at 1, col. 1 [hereinafter Weltner].

140. Weltner, *supra* note 139.

141. Elsner & Bender, *The Torok Tort: Recovery for Abusive Litigation*, 23 GA. ST. B.J. 84, 87 (Nov. 1986) [hereinafter Elsner].

fore, recovery of punitive damages would constitute a double recovery.[142] The court's reasoning represents a change from the older common law torts which did allow recovery of punitive damages for malicious use[143] and malicious abuse of process.[144]

D. The Abusive Litigation Standard

Abusive litigation damages may be awarded when a claimant proves liability on the part of the opposing party.[145] The legal standard the *Yost* court adopts to determine liability for abusive litigation is essentially the same language employed by the Georgia legislature in O.C.G.A. § 9-15-14.[146] The *Yost* opinion quotes three independent tests; violation of any one will establish liability. These tests are primarily objective, although a subjective standard can establish liability.

First, any "party" shall be liable for abusive litigation for the assertion of a "claim, defense, or other position [when] there exists such a complete absence of any justiciable issue of law or fact that it reasonably could not be believed that a court would accept the asserted claim, defense or other position . . . ."[147] The test is purely objective when viewed from the defendant's (in the abusive litigation claim) point of view. The standard is very similar to the probable cause requirement of malicious use. Lack of probable cause for malicious prosecution is defined in Georgia as "circumstances . . . such as to satisfy a reasonable man that the accuser had no ground for proceeding but his desire to injure the accused."[148] The same definition applies in malicious use of process.[149] A claim lacking probable cause, but without legal malice and termination of the proceedings in favor of the defendant, is insufficient to maintain a malicious use claim. However, the same

142. *Yost*, 256 Ga. at 95 n.3, 344 S.E.2d at 417 n.3. *See also* Elsner, *supra* note 141, at 87.

143. *E.g.*, Dixie Broadcasting Corp. v. Rivers, 209 Ga. 98, 106, 70 S.E.2d 734, 741 (1952).

144. *E.g.*, Tapley v. Youmans, 95 Ga. App. 161, 175, 97 S.E.2d 365, 374 (1957).

145. *Yost*, 256 Ga. at 95, 344 S.E.2d at 417.

146. *Compare id. with* O.C.G.A. § 9-15-14(a), (b) (Supp. 1987).

147. *Yost*, 256 Ga. at 96, 344 S.E.2d at 417. The court's language varies from the statutory language of O.C.G.A. § 9-15-14(a) and the wording in West's advance sheets. Section 9-15-14 (and the advance sheets) uses the phrase "could not be reasonably believed." The court's final version makes a grammatical change and uses the phrase "reasonably could not be believed."

148. O.C.G.A. § 51-7-43 (1982).

149. Wilson v. Dunaway, 112 Ga. App. 241, 244, 144 S.E.2d 542, 545 (1965).

claim lacking "reasonableness" in asserting or defending an action, without more, now suffices to establish the prima facie elements of the new tort of abusive litigation.

All three commentators cited in the *Yost* decision proposed retaining the probable cause requirement.[150] Additionally, each commentator suggested that a reasonableness standard apply, so that the attorney's subjective intent does not become a part of the tort claim.[151]

The second test created by the *Yost* court provides that "any party who shall bring or defend an action, or any part thereof, that lacks substantial justification, or is interposed for delay or harassment," shall be liable for abusive litigation.[152] Part of this language, "interposed for delay or harassment," is similar to the language of Rule 11 of the Federal Rules of Civil Procedure. Rule 11 requires a "reasonable inquiry" into the surrounding circumstances prior to proceeding with a pleading, motion, or discovery.[153]

To the extent the *Yost* court uses language analogous to Rule 11, an objective analysis of the facts will determine liability. The record and surrounding circumstances will suffice to establish whether the questioned action "lacked substantial justification" or resulted in "delay or harassment."[154]

The subjective intent of an accused party (or his attorney) should not be relevant under the second test.[155] Determining subjective intent or bad faith would require additional testimony by the attorney and complicate attorney-client privilege problems. Employing a subjective intent standard also provides less clear instructions to practitioners and would not be as effective a deterrent as would an objective standard. Furthermore, a determination that a lawsuit was conducted in bad faith may lead to subsequent disciplinary proceedings or a malpractice claim against the losing attorney.[156] Nevertheless, the *Yost* opinion indicates that the subjective intent of the party may be relevant. The court's approach to subjective intent is discussed more fully below.

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150. *See Frivolous Litigation, supra* note 92, at 257-58; Note, *Groundless Litigation, supra* note 8, at 1234-35; Note, *Unfounded Litigation, supra* note 92, at 772.

151. *See* authorities cited *supra* note 150.

152. *Yost*, 256 Ga. at 96, 344 S.E.2d at 417.

153. *See* Schwarzer, *supra* note 45; *see supra* text accompanying notes 51-54 (discussing FED. R. CIV. P. 11).

154. *See Yost*, 256 Ga. at 96, 344 S.E.2d at 417.

155. *See* Schwarzer, *supra* note 45, at 195; *Frivolous Litigation, supra* note 92, at 258.

156. Schwarzer, *supra* note 45, at 196.

The third *Yost* test for abusive litigation establishes liability when any party "unnecessarily expands the proceeding by other improper conduct, including, but not limited to, abuses of discovery procedures."[157] Again, this test appears to require an objective analysis of the facts. Significantly, the language refers to improper "conduct" and not improper "purpose." An inquiry into the latter obviously would involve an evaluation of motive or intent. The conduct of the defendant party, or his attorney, is evaluated by the jury in light of all the circumstances. The subjective intent of the parties or attorneys is irrelevant, even if process is initiated or used unreasonably or without due care.

The tests for abusive litigation, as adopted from O.C.G.A. § 9-15-14, are disjunctive. A violation of any one standard will establish liability.[158] The use of three independent tests of liability greatly expands the reach of the new tort of abusive litigation beyond its predecessors. Instead of having to overcome multiple requirements to make a claim for wrongful use of civil process, a claimant now may establish liability by pursuing any one of the three objective criteria in a single claim for damages.

The commentators who urge the redefinition of the torts of malicious use and malicious abuse of process originally proposed that the legal standard for liability be objective.[159] Additionally, the facts of *Yost* support an objective application of the legal standard. The Toroks' suit reached the supreme court because the validity of their malicious abuse counterclaim against defendant Yost was disputed. The supreme court did not rule in favor of the Toroks' malicious abuse claim because Yost's counterclaim was a legitimate use of process, although it was filed with bad intentions.[160] Therefore, the Toroks were injured but did not have a valid cause of action.[161] The court fashioned its new tort to resolve this dilemma.

Although the court emphasized the intentional nature of Yost's actions and the lack of an available remedy under the old tort of abuse of process, an objective application of the new tort of abusive litigation remedies the Toroks' dilemma. Application of the court's new objective test illustrates the expansiveness of the tort of abusive litigation when compared with malicious use or malicious abuse.

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157. *Yost*, 256 Ga. at 96, 344 S.E.2d at 417.
158. *See* O.C.G.A. § 9-15-14(a), (b) (Supp. 1987).
159. *E.g.*, *Frivolous Litigation*, *supra* note 92, at 257.
160. *Yost*, 256 Ga. at 94, 344 S.E.2d at 416.
161. *Id.*

There was a complete absence of a justiciable issue of law and fact in Yost's counterclaim. Yost knew that the auto accident prompting the Toroks' lawsuit had occurred, despite his denial. Likewise, Yost's counterclaim was dilatory, harassing, and unnecessarily expanded the proceedings.[162] Despite the regular use of the process, it was unreasonable under the circumstances. Thus, in the new tort, it appears that lack of probable cause, or lack of reasonableness, has replaced the ulterior motive requirement of malicious abuse of process.

However, another passage in the *Yost* opinion suggests that an inquiry into subjective intent is required to determine liability. The court stated that even though a claim may have "some" merit, it is nonetheless abusive litigation when "brought with the principal intent or effect of harassment, coercion, or embarrassment."[163] The reference to "intent" indicates that the court considered the state of mind of the party accused of abusive litigation relevant in determining liability.

The court included mental distress damages and nominal damages within the scope of remedies for abusive litigation.[164] A party may recover damages for mental distress when the other party demonstrates "wilfulness, or wanton and reckless disregard of consequences which is the equivalent of wilfulness."[165] The "wilfulness" standard seems to be an intentional acts standard requiring consideration of the defendant's subjective state of mind.[166] Furthermore, "wilfulness" should easily come within the definition of

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162. *See supra* note 99 and accompanying text.

163. *Yost*, 256 Ga. at 93, 344 S.E.2d at 415.

164. *Id.* at 95, 344 S.E.2d at 417.

165. *Id.*

166. Prosser's treatise elaborates the elements of this approach:

> A different approach . . . looks to the actor's real or supposed state of mind. Lying between intent to do harm . . . and the mere unreasonable risk of harm to another involved in ordinary negligence, there is a penumbra of what has been called 'quasi-intent.' To this area the words 'willful,' 'wanton,' or 'reckless,' are customarily applied . . . . They apply to conduct which is still, at essence, negligent, rather than actually intended to do harm, but which is so far from a proper state of mind that it is treated in many respects as if it were so intended . . . . The usual meaning assigned to 'willful,' 'wanton,' or 'reckless,' . . . is that the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences.

W. PROSSER & W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 34 (5th ed. 1984) (footnotes omitted).

"lacks substantial justification."[167]

Additionally, the provision for nominal damages[168] may also indicate that the court views abusive litigation as a quasi-intentional tort. When a claimant asks for nominal damages in the absence of special damages, it would seem that intent to injure must be proven and that a showing of mere negligence does not suffice.

It is clear from the rationale of the opinion that abusive litigation is primarily a compensatory tort and secondarily a deterrent measure. The primary purpose of the new tort comports with the history of the older torts of malicious use and malicious abuse of process. With the new tort, internal sanctions are designed to deter frivolous lawsuits; the older torts serve as a secondary measure compensating injured litigants.[169] Consequently, the claimant's degree of harm may dictate the scope of the abusive litigation tort. In the absence of actual harm, proving an intent to injure or demonstrating bad faith may be required to obtain an award of nominal damages.

As the tort of abusive litigation is further defined, it may be narrowed to require both subjective intent and objective misconduct before a claim is actionable. However, it is more likely that the court will find liability when a party acted either unreasonably *or* in bad faith.

III. Potential Effect and Problems Created by *Yost*

The *Yost* decision could have an effect ranging from very slight to very great.[170] Justice Weltner, commenting on what effect the *Yost* decision might have, stated that "this case will either be an important case or unimportant case, depending on what you [attorneys] do with it."[171] However, he minimized its significance in terms of recovery by saying that once punitive damages, attorney's

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167. "Lacks substantial justification" includes "conduct" which is "substantially vexatious." *Yost*, 256 Ga. at 96, 344 S.E.2d at 417.

168. *Yost*, 256 Ga. at 95, 344 S.E.2d at 417.

169. Note, *Groundless Litigation*, *supra* note 8, at 1237.

170. The following is a list of decisions interpreting or commenting on *Yost*, reported as of July 1, 1987: Williams v. Patel, 179 Ga. App. 570, 347 S.E.2d 337 (1986); Bushey v. Atlanta Emergency Group, 179 Ga. App. 827, 348 S.E.2d 98 (1986); Smith v. Pierce, 179 Ga. App. 724, 347 S.E.2d 692 (1986); Young v. Bank of Quitman, 180 Ga. App. 491, 349 S.E.2d 510 (1986); Howell v. Bank of Fitzgerald, 181 Ga. App. 57, 351 S.E.2d 258 (1986); Rothstein v. L.F. Still & Co., 181 Ga. App. 113, 351 S.E.2d 513 (1986); Sasser v. Mixon Contracting, 181 Ga. App. 710, 353 S.E.2d 525 (1987); Holbrook Contracting v. Tyner, 181 Ga. App. 838, 354 S.E.2d 22 (1987).

171. Weltner, *supra* note 139.

fees, and expenses of litigation are eliminated, "[w]hat is left is not, I suggest, a whole lot."[172] In fact, in the first year following the *Yost* decision, only one abusive litigation claim resulted in an award of damages.[173]

A. Procedural Problems

The *Yost* decision has created the potential for procedural problems, which future decisions must resolve. The *Yost* decision borrows key language from sections 9-15-14(a) and (b) to create the liability test for abusive litigation.[174] Although altered, the liability test of the new tort is essentially the same as that of the statute.[175] Thus, it appears that an abusive litigation tort claim and a section 9-15-14 claim for attorney's fees should arise under the same circumstances, and either both succeed, or both fail.[176]

However, there are significant differences between section 9-15-14 and the tort of abusive litigation beyond the potential types of recoveries that are available under each. Under section 9-15-14, damages can be assessed against either the party, his attorney, or both. Furthermore, sanctions are initiated either upon motion of a party within forty-five days after final disposition of the action or by the court. In either event, the court decides the issues of liability and damages.

The scope and procedures of an abusive litigation tort claim are significantly different from those of a section 9-15-14 claim. Abusive litigation awards are assessed only against the liable "party."[177] Damages for abusive litigation are not assessed directly against the attorney. The abusive litigation claim is heard by the same fact finder—a judge or jury—who heard the underlying claim.[178] In jury trials, a bifurcated trial procedure is used. The abusive litigation claim is tried immediately following the disposition of the underlying action.[179] An abusive litigation claim can be initiated by either party but must be brought as a compulsory

172. *Id.*

173. *See* Jones v. Jones, No. 86-4860 (Dekalb Super. Ct., June 3, 1987) (claimant was awarded abusive litigation damages by a judge sitting as the trier of fact in a domestic case), *noted in* Fulton County Daily Rep., June 4, 1987, at 1, col. 1.

174. *Yost*, 256 Ga. at 96, 344 S.E.2d at 417. *See* O.C.G.A. § 9-15-14(a), (b) (Supp. 1987).

175. Weltner, *supra* note 139.

176. *See* Jenkins, *supra* note 54, at 8.

177. *Yost*, 256 Ga. at 96, 344 S.E.2d at 417.

178. *Id.* at 96, 344 S.E.2d at 418.

179. *Id.*

counterclaim or compulsory additional claim.[180] Failure to make the claim results in a loss of the cause of action for abusive litigation.[181]

In the areas in which the *Yost* decision differs from section 9-15-14, unique and complicated problems arise that detract from the effectiveness of the new abusive litigation tort. One potential problem arises when an abusive litigation damage award is assessed against the liable "party," but that party's attorney is responsible for the abuse.[182] Should the attorney deny any culpability, and not offer to pay for the damages, the client may have to seek alternative measures to gain relief. The client may seek to implead her own attorney.[183] Assuming the attorney will not implead himself, the client will have to seek other counsel. This, too, is problematic because the abusive litigation claim is tried "immediately" following the underlying action.[184] There would likely be no opportunity to obtain outside counsel for the abusive litigation claim, unless a continuance is granted and the jury is recalled at a later time.

Furthermore, the allegedly liable party may not know whether an abusive litigation claim will survive the main action. Supposing an abusive litigation compulsory counterclaim is filed against a plaintiff for filing suit (formerly a malicious use claim) and the plaintiff prevails, the abusive litigation claim is lost.[185] The plaintiff in such a lawsuit will not know whether retention of separate counsel is necessary.

The losing party in an abusive litigation claim may bring a separate legal malpractice claim against her attorney.[186] If the abusive

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180. *Id.*

181. O.C.G.A. § 9-11-13(a) (1982).

182. *See* Elsner, *supra* note 141, at 86.

183. Hammond, *supra* note 99, at 13 (on remand in *Torok v. Yost*, Yost retained another attorney and filed a third-party claim against his original defense attorney and his insurance company, asserting their liability for the abusive litigation claim). *See also* Elsner, *supra* note 141, at 86.

184. *Yost*, 256 Ga. at 96, 344 S.E.2d at 418.

185. *E.g.*, Rothstein v. L.F. Still & Co., 181 Ga. App. 113, 116, 351 S.E.2d 513, 515 (1986) ("[w]hile *Yost* eliminated the requirement that claims for malicious use of process be brought in a subsequent action, it did not change the requirement of a favorable termination"); Smith v. Pierce, 179 Ga. App. 724, 725, 347 S.E.2d 692, 693 (1986) ("[s]urvival of the defendant's counterclaim is dependent upon the final disposition of the plaintiff's action").

186. *See* Bushey v. Atlanta Emergency Group, 179 Ga. App. 827, 830 n.1, 348 S.E.2d 98, 101 n.1 (1986) (concurring opinion urging disclosure of risks to clients in order to avoid malpractice). "[I]n almost every case in the future, advising a client of the risks of litigation with regard to costs and damages for abusive litigation may be especially appropriate." *Id. See also* Elsner, *supra* note 141, at 86.

litigation claim is lost, a separate suit by the client against her attorney for indemnification or contribution may follow.[187] In any event, the possibility of satellite trials needlessly contributes to court congestion and fails to "eliminate the prospect of never-ending litigation" because all the issues are not "resolved in one trial."[188]

Ultimately, however, the culpable attorney likely will be held accountable for the damages he causes.[189] The potential liability of attorneys should have a positive, deterrent effect in reducing the number of frivolous and abusive claims. However, as an indirect result, liberal use of the new tort may result in higher hourly billing rates, in an attempt to offset increased costs. Attorneys may be more selective in trying cases. Accordingly, it is possible that smaller cases involving lesser dollar amounts may create more of a risk than a benefit for the attorney. Also, cases with close issues of law or fact are more likely to be settled out of court for lesser amounts than they would if they had been determined by a jury verdict.

Additional problems are created by the compulsory counterclaim and compulsory additional claim procedure.[190] The first problem is determining what is a compulsory additional claim. No definition is supplied in the Georgia Civil Practice Act.[191] The claim must be the plaintiff's, who must file an additional claim or pleading in response to a defendant's answer that is abusive or unreasonable.[192]

The compulsory counterclaim is intended to "eliminate the prospect of never-ending litigation."[193] It provides immediate relief for an injured litigant, eliminates needless use of court time and expense, and also serves as a strong deterrent of abuses.[194] The compulsory counterclaim serves the same function as malice and lack of probable cause; it is designed to eliminate the prospect of one claim leading to another, ad infinitum.[195]

Despite the court's intention that the compulsory counterclaim procedure limit the trial court proceedings, it seems more likely

187. Address by Randolph Mayer, A.B.A. Symposium, in Atlanta (Sept. 26, 1986), *reprinted in* Fulton County Daily Rep., Sept. 30, 1986, at 2, col. 1 [hereinafter Mayer].
188. *Yost*, 256 Ga. at 96, 344 S.E.2d at 418.
189. Mayer, *supra* note 187.
190. *See Yost*, 256 Ga. at 96, 344 S.E.2d at 418.
191. Jenkins, *supra* note 54, at 5.
192. *See* O.C.G.A. § 9-11-13(a) (1982). *See also id.*
193. *Yost*, 256 Ga. at 96, 344 S.E.2d at 418.
194. Note, *Groundless Litigation*, *supra* note 8, at 1236-37.
195. *See Yost*, 256 Ga. at 94, 344 S.E.2d at 416.

that the procedure could lead to unnecessary expansions. The compulsory nature of the claim creates pressure for attorneys to claim abusive litigation when the claim would not otherwise have been asserted. Failure to file the claim means it is lost after disposition of the underlying claim. Also, a negligent failure to file the counterclaim, if a cause of action exists, could lead to a malpractice action against the attorney.[196] In both instances, an attorney will likely want to pursue the abusive litigation claim whenever possible providing the claim has merit.

Making the abusive litigation tort available through a compulsory counterclaim should also increase its use by litigants. Because the action is now available during the course of the litigation, a party emotionally involved in the suit may be more apt to use all available means against the opposing party. Formerly, the malicious use requirement of termination in favor of the defendant prevented a party from filing a counterclaim for damages during the pendency of the underlying claim.[197] As a result, parties had time to think and act, as opposed to react, to the circumstances surrounding the litigation. However, the new tort is now instantly available during the heat of the litigation. Instead of decreasing unnecessary litigation, it may increase groundless litigation.

Should a party elect to file an abusive litigation counterclaim, it must be meritorious, or else there may be a similar counterclaim in return. Theoretically, the filing of counterclaims back and forth could go on ad infinitum.[198] Also, allowing opposing parties to pursue collateral matters before trial needlessly increases tensions for all concerned. Consequently, opposing counsel may become adversarial and intransigent at a time when compromise could lead to a pre-trial settlement.[199] Receipt of an abusive litigation claim could also create dissension and increase tension between an attorney and his client.[200]

196. Mayer, *supra* note 187; *see also* Gibson v. Talley, 162 Ga. App. 303, 304-05, 291 S.E.2d 72, 74 (1982) (attorney's failure to file a client's claim within the statute of limitations constitutes actionable malpractice, without the need for expert testimony concerning the acceptable level of professional conduct).

197. *E.g.*, Metro Chrysler-Plymouth, Inc. v. Pearce, 121 Ga. App. 835, 175 S.E.2d 910 (1970).

198. *See* Note, *Unfounded Litigation*, *supra* note 92, at 754 (author suggests that the trial judge should be allowed considerable discretion to prevent dueling counterclaims).

199. Mayer, *supra* note 187.

200. Huddleston & Evans, *Litigators on Trial: Professionalism Implications of Yost v. Torok*, 23 GA. ST. B.J. 88 (Nov. 1986) [hereinafter Huddleston].

The varied circumstances for filing abusive litigation counterclaims demonstrate how this new tort will likely expand court proceedings and tax judicial resources. Attorneys may feel pressured or obligated to make the claim whenever possible. Litigants, seeking an edge or immediate compensation for perceived abuses, may sue in tort more readily. Any errors or perceived errors in judgment made in filing the initial claim or counterclaim may cause a subsequent counterclaim in return. As a result, collateral issues may so dominate the plaintiff's case that pre-trial settlement may become less likely.

B. Ethical Dilemmas Created By Yost

The compulsory counterclaim procedure also creates potential conflict of interest problems. These conflicts can arise whether the abusive litigation claim is made before trial or at trial. Once the claim is made, the attorney must consider the extent of his responsibility for the claim and at the same time attempt to represent both his client's and his own interests.

The primary dilemma created is a conflict of interest between attorney and client. The attorney may be facing the prospect of losing the primary case. In addition, his handling of the case may cause his client to incur additional damages and attorney's fees.[201] As a result, the client and attorney could become adversaries during the course of the litigation.[202] When the attorney's conduct gives rise to the abusive litigation claim, the attorney is placed in the unethical position of being an advocate, advisor, and interested party, all in the same action. An attorney advising his client on the underlying suit or the derivative suit, simultaneously will want to protect his own personal interests. Certainly, this would be a conflict of interest.[203] If the attorney cannot advocate his client's interests without prejudice, he may have to withdraw his representation.[204]

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201. Section 9-15-14 provides that either the party, the party's attorney, or both may be assessed attorney's fees and expenses. O.C.G.A. § 9-15-14(a) (Supp. 1987).

202. Huddleston, *supra* note 200, at 88.

203. Address by Richard Sinkfield, A.B.A. Symposium, in Atlanta (Sept. 26, 1986), *reprinted in* Fulton County Daily Rep., Sept. 30, 1986, at 2, col. 4.

204. *See* HANDBOOK, *supra* note 35, DR 2-110, Standard 30, and EC 5-1. DR 2-110 provides guidelines about when an attorney should withdraw from employment. Standard 30 states:

> Except with the written consent or written notice to his client after full disclosure a lawyer shall not accept or continue employment if the exercise of his professional judgment on behalf of his client will be or reasona-

When an abusive litigation defendant impleads her attorney, the attorney may be required to testify during the same trial. An attorney "may reveal confidences or secrets [of his client] necessary . . . to defend himself . . . against an accusation of wrongful conduct."[205] However, an attorney may not take the stand to testify, for or against his client, concerning any matters arising out of their employment relationship.[206] Yet, the attorney's direct testimony may often be the only source of relevant evidence either to prove or disprove the abusive litigation claim.[207]

If the abusive litigation claim is made prior to trial, discovery procedures also can create attorney-client privilege problems. The party seeking discovery has the right to "know the issues and be fully prepared on the facts."[208] Yet, often the information sought in an abusive litigation claim will either be privileged attorney-client communications or an attorney's mental impressions and legal theories.

Attorney-client communications, transmitted during or in anticipation of the attorney's employment, are privileged and "shall never be heard by the court."[209] Because the privilege is absolute, such communications are not discoverable.[210] Likewise, the "mental impressions, conclusions, opinions, or legal theories of an attorney"[211] are not discoverable.[212]

However, it is this very subject matter, protected from discovery, which an abusive litigation claimant will seek in order to prepare

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> bly may be affected by his own financial, business, property or personal interests.

Id. EC 5-1 states that:

> The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

Id.

205. *See* HANDBOOK, *supra* note 35, DR 4-101(C)(4).

206. O.C.G.A. § 24-9-25 (1982).

207. *See* Address by Georgia Supreme Court Justice Charles Weltner, ICLE Medical Malpractice Seminar (Oct. 17, 1986) (Justice Weltner expressed uncertainty concerning how the court will decide the issue of attorneys testifying), *reprinted in* Fulton County Daily Rep., Oct. 20, 1986, at 1, col. 1 [hereinafter ICLE Seminar].

208. Travis Meat & Seafood Co. v. Ashworth, 127 Ga. App. 284, 286, 193 S.E.2d 166, 168 (1972).

209. O.C.G.A. § 24-9-24 (1982).

210. *E.g.*, Atlantic Coast Line R.R. v. Daugherty, 111 Ga. App. 144, 149, 141 S.E.2d 112, 116 (1965).

211. O.C.G.A. § 9-11-26(b)(3) (Supp. 1987).

212. *E.g.*, Tobacco Rd., Inc. v. Callaghan, 174 Ga. App. 539, 330 S.E.2d 768 (1985).

her case. On the other hand, if discovery of privileged communications or attorney mental impressions and legal theories is allowed before trial, the claimant may gain an unwarranted tactical or substantive advantage in the primary case. The resulting unfairness is obvious given that the plaintiff in the pending abusive litigation claim may not proceed unless she prevails in the underlying action.[213] The court should exercise discretion and allow the primary lawsuit to be tried with minimal interference. If the abusive litigation claimant is given the advantage of liberal pre-trial discovery, the court may indirectly bolster her primary claim and substantiate a subsequent section 9-15-14 claim. Furthermore, abusive litigation claims could needlessly increase when parties realize they can obtain more discovery materials when they bring an abusive litigation action.

Once discovery is permitted, an attorney may face additional conflict of interest problems. When the attorney is potentially responsible for the claim, he will have a conflict of interest when completing his client's answers to interrogatories. Also, permitting the deposition of an attorney prior to trial concerning the merits of pleadings and motions and the authorization of litigation tactics creates a conflict of interest. The attorney may be unable to testify to these matters as a witness, when in fact he is the responsible party. Moreover, the attorney's personal interest may preclude his ability to represent fully his client's interest.[214]

C. Problems With Proving Abusive Litigation

The claimant is required to prove her case in a separate trial immediately following the main trial.[215] The same judge and trier of fact who heard the main action also decide the derivative claim. However, when a jury hears the underlying case, it may not be made aware of the abusive litigation claim until conclusion of the main trial.[216] The *Yost* court adopted a bifurcated trial format to expedite court time and to provide immediate relief to the claimant.[217] Despite the proposed advantages, the bifurcated trial creates problems of its own.

Utilizing the same jury for the abusive litigation claim may deny

213. *See* sources cited *supra* note 185.
214. *See supra* note 204.
215. *Yost*, 256 Ga. at 96, 344 S.E.2d at 418.
216. *Id.*
217. *Id. Cf.* Note, *Groundless Litigation*, *supra* note 8, at 1234-37.

the defendant an impartial trier of fact. The jury first learns of the need for a second trial to decide the abusive litigation claim after it has heard and deliberated over the underlying trial. As a result, tired jury members may resent the need to continue what they thought was a terminated service. Additionally, the jury already has reasoned that one of the litigating parties is wrong and will not prevail. Jury members may assume their verdict concludes their obligation to the court. Instead, the jury is asked to remain and decide if the party they have determined to be wrong in the dispute is also wrong in bringing the lawsuit.

The bifurcated trial system's obvious problem is that the jury may no longer be impartial.[218] Before the primary trial begins, prejudiced jurors may be excused or stricken on *voir dire*, but during the abusive litigation portion of the trial there is no further *voir dire*. However, a jury that is already familiar with the facts of the trial should be able to reach an expeditious verdict. On the other hand, the jury may not be able to remain impartial in deciding whether the losing party's lawsuit was reasonable and meritorious.[219] The jury may seek to reinforce its verdict and find that the losing party in the main suit is additionally liable for pursuing or failing to reconcile the lawsuit.

In situations in which the case-in-chief is tried by a judge or in a non-jury setting, the judicial economy rationale of *Yost* is defeated. Because the *Yost* court has created a common law tort, however, it appears that the defendant in the abusive litigation claim has the right to elect to have a jury trial.[220] If a jury hears an abusive litigation claim after an underlying bench trial, it will have to be educated about the facts. In essence, the claim would proceed much like a malicious use or malicious abuse claim, except that the jury would use the new legal standard.

D. Potential Abuse Of Abusive Litigation

An alarming consequence of the new tort of abusive litigation is its potential for abuse. Attorneys who abused litigation before *Yost*, and for whom *Yost* is intended, will have yet another availa-

218. Mayer, *supra* note 187.

219. *Id.*

220. *See* GA. CONST. art. I, § 1, ¶ 11; *see also* O.C.G.A. § 9-11-38 (1982) (guaranteeing right to trial by jury). *Cf.* Strange v. Strange, 222 Ga. 44, 45, 148 S.E.2d 494, 495 (1966) ("[I]n civil actions the right of a jury trial exists only in those cases where the right existed prior to the first Georgia Constitution, and the Constitution guarantees the continuance of this right unchanged as it existed at common law.").

ble resource to abuse the system further.[221] The abusive litigation claim can itself become a tool of harassment, by increasing expense and creating tension between the opposing attorney and client.[222]

Formerly, malicious use and malicious abuse served to deter and compensate for abusive tactics, but the results were less immediate. These torts could not be used in the plaintiff's main action, and relief from these torts depended on a subsequent trial to determine the liability and damage issues.

Conversely, the abusive litigation tort can be used affirmatively as a tool to compensate injury and also potentially to harass opposing parties.[223] However, should the opposing side believe the counterclaim is filed primarily to harass, it may file an abusive litigation counterclaim in return.[224] Harassing counterclaims may include those filed: to disrupt the opposing attorney-client relationship; to seek the withdrawal of opposing counsel; to detract from the merits of the plaintiff's case; or to gain discovery of privileged material.

In any event, the great number of abusive litigation claims filed shortly after the rendering of the *Yost* decision indicates that the new tort will be used far more often than its two predecessors.[225] Without appropriate controls, the inevitable result is longer trials, more litigation, and less judicial economy.

The answers to the problems created by the *Yost* decision will establish the scope and effect of the decision. The *Yost* court specifically created the new tort of abusive litigation for two reasons: first, to formulate remedies not available under malicious use and malicious abuse of process; and second, to provide a better deterrent to groundless litigation. The new tort has eliminated many of the barriers to bringing a suit for wrongful use or abuse of civil process. The expansive damages available and the ease of pursuing a remedy should provide the intended deterrent effect. It is hoped that the new tort will cause users of the court system to exercise greater caution.

Whatever advances the tort of abusive litigation makes towards these ends, these advances must be balanced against their potential costs. The tort of abusive litigation can be used as a sword as well as the shield it was intended to be. Filing a claim can disrupt

221. Huddleston, *supra* note 200, at 88.
222. *Id.* at 90.
223. *Id.*
224. *Id.*
225. *Id.* at 88.

the merits of the opposing party's case. It can indirectly lead to the defeat of the opposing party's case. Furthermore, it can cause the dissolution of the attorney-client relationship.

Additionally, an abusive litigation claim can cause expanded trials, fewer settlements, potential conflicts of interest, discovery abuses, and biased juries. The sum of all these costs may result in more expensive litigation, higher attorney's billing rates, and a potential chilling effect on legitimate litigation. When resolving the problems created by abusive litigation, the costs and the benefits must be considered. Is more to be gained by allowing the disputed process? Or is more to be gained by compensating the claimant and deterring future abuses?

IV. Tort and Statute: Need For Continuity

The *Yost* decision and O.C.G.A. § 9-15-14 share common goals and language. The court decision is more complex and presents more problems than does the statute. And even though both have a common purpose (although with different emphasis), they operate in somewhat of a vacuum. Because both use a similar test for liability, with similar language, it would seem that an abusive litigation claim should succeed when section 9-15-14 sanctions for attorney's fees and expenses would succeed, and vice versa. In several situations, however, this result may not necessarily follow.

Under one scenario, a claimant asserts an abusive litigation claim and subsequently prevails. This tort claim will have been concluded immediately following the underlying action.[226] Will the court then uphold the reasonableness of the jury's findings and rule in favor of the claimant's subsequent motion under section 9-15-14 for attorney's fees?[227] The court may refuse to do so on the grounds that the jury considered the defendant's subjective intent, which is not permitted in the statutory claim. But if the judge and jury disagree on a finding of fact using the same standard of liability, will there be grounds for automatic appeal?

The preferred course of action would be for the Georgia legislature to merge recovery for abusive litigation claims with recovery for section 9-15-14 claims. In so doing, the legislature would codify recovery for tort damages resulting from abusive litigation claims. It should choose one trier of fact—preferably a judge—to render

226. *See Yost*, 256 Ga. at 96, 344 S.E.2d at 418.

227. Claimant has forty-five days to submit a motion for an award of attorneys' fees and costs. O.C.G.A. § 9-15-14(e) (Supp. 1987).

one consistent determination on the frivolous litigation claim. However, absent legislative action, the parties have the right to a jury trial for the tort claim.[228] In the alternative, a jury can decide[229] both issues at once, subject to one discretionary appeal.[230] Consolidating both the tort and statutory claims into one action would maximize the efficient use of court time and resources, resolve all the claimant's damage issues, and conclude all related issues at one time without the possibility of contradictory results.

A second scenario occurs when the claimant loses the abusive litigation tort claim and then files for statutory sanctions. Arguably, the judge may find differently than the jury. If the judge does not find differently, the defendant may have a valid complaint that the claimant made a motion for fees without a reasonable belief that the "court would accept the asserted" position, since that issue already had been decided by a jury.[231] Furthermore, the motion would seem to be "substantially groundless." Thus, when the abusive litigation claim is defeated, the subsequent statutory motion should be precluded.

The irony is that the defendant in a section 9-15-14 motion cannot obtain relief for her incurred fees, costs, or damages. Because the underlying case has been concluded, the defendant cannot subsequently assert an abusive litigation claim in response to the claimant's motion for fees. The tort claim "arises, by necessity, only after the commencement of civil proceedings."[232] And because it is "compulsory," the claim cannot be pursued after the action is concluded. When the claimant files a section 9-15-14 motion "within 45 days after the final disposition of the action,"[233] the defendant also is without a statutory remedy. Subsections (a) and (b) of section 9-15-14 each require that the abuse occur "in any civil action" before sanctions apply. Thus a movant under a section 9-15-14 motion may be able to escape liability under the new tort or the new Code provision and leave the defendant without a remedy. Because a section 9-15-14 movant is not at risk if she loses a motion for fees, it can be expected that section 9-15-14 sanctions will

228. *See supra* note 220 and accompanying text.

229. Under O.C.G.A. § 13-6-11, the question of awarding of attorney's fees for a tort cause of action is within the province of the jury. *See, e.g.*, Sun v. Langston, 170 Ga. App. 60, 62, 316 S.E.2d 172, 175 (1984).

230. O.C.G.A. § 5-6-35 (Supp. 1987) allows for a discretionary appeal of an adverse judgment under § 9-15-14.

231. O.C.G.A. § 9-15-14(a) (Supp. 1987).

232. *Yost*, 256 Ga. at 96, 344 S.E.2d at 417.

233. O.C.G.A. § 9-15-14(e) (Supp. 1987).

be liberally requested.

In those cases in which a party pursues an abusive litigation claim, attorney's fees and expenses of litigation should be recoverable under section 9-15-14 for the derivative lawsuit. Section 9-15-14 provides that the assessment of attorney's fees and expenses is not to exceed "amounts which are reasonable and necessary for defending or asserting the rights of a party."[234] Whether a claim for abusive litigation amounts to an assertion of a party's rights is uncertain, however. Since the assertion of the claim occurs "in" a civil action and is directly related to the defendant's alleged abuse, section 9-15-14 should cover a motion for any incurred attorney's fees. Causation is the key issue. Because the derivative lawsuit arose due to an alleged abuse in the primary trial, when there is no actual abuse by the defendant in the abusive litigation portion of the trial, it may be argued that recovery of attorney's fees in the secondary suit constitutes a double recovery of fees for one abuse.

A stronger argument exists, however, that the secondary suit is a continuation of the one abuse. Awarding attorney's fees for abuse in the underlying trial and for the abusive litigation portion of the trial itself comports with the rationale underlying the abusive litigation tort and section 9-15-14. To restate, an award of attorney's fees would make the claimant whole by not penalizing her for the tort claim and more effectively deter abusive tactics.

What if the abusive litigation claimant loses? It is likely that the judge will reach the same conclusion on the statutory motion as the jury reached on the tort claim, namely, the claimant will not recover attorney's fees. However, if a successful abusive litigation claimant can recover attorney's fees for the derivative lawsuit, it follows that the successful defendant can do the same. The defendant has forty-five days after the trial to move for attorney's fees for the claimant's unreasonable tort claim. Again, should the movant lose his motion the other party will not be subject to damages.

Section 9-15-14 is of greatest value when a claimant who has been subjected to frivolous litigation has incurred no special damages and therefore has no actionable tort remedy. Attorney's fees may nevertheless be recoverable. If a party prevails on the abusive litigation claim, it can be expected that a section 9-15-14 claim for attorney's fees and expenses will follow.

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234. O.C.G.A. § 9-15-14(d) (Supp. 1987).

CONCLUSION

Yost v. Torok and section 9-15-14 have altered the Georgia courts' approach to litigation and litigants. In so doing, litigants will have to change their approach to litigation. Open access to the courts and narrow avenues for redressing abusive behavior have been replaced by a system that provides immediate compensation of damages, fees, and costs through an accessible but cumbersome procedural mechanism.

O.C.G.A. § 9-15-14 contains broad legislative language requiring the imposition of attorney's fees and expenses of litigation on violators of the new statute. The statute represents a compromise of ideas and is primarily designed to deter frivolous litigation and to compensate injured parties.

The *Yost* decision merged and redefined the common law torts of malicious use and malicious abuse of civil process into one new tort—abusive litigation. The new tort adopted the language used in section 9-15-14 as a test for liability, although the common law test may contain more subjective elements than the statute.

Yost was decided, in part, to end the difficulties and inadequacies of the torts of malicious use and malicious abuse of process. The court's rationale supports the contention that the new tort of abusive litigation primarily serves to compensate litigants damaged by meritless litigation and, as a secondary function, to deter abuses of the court system.

The effectiveness of the abusive litigation tort is hampered by the many problems it presents. These problems include: a chilling effect on litigation, more expensive litigation, expanded trials, conflicts of interest, discovery dilemmas, biased jurors, and, in general, situations in which the new tort can be used to defeat its own purpose.

It is hoped that as the problems of the *Yost* opinion are resolved, the court will consider both the apparent and the hidden ramifications of the new tort. The tort of abusive litigation provides a commendable opportunity for the Toroks and others similarly situated to recover for abusive litigation tactics in situations in which no remedy previously existed. Deterring groundless, injurious, and abusive lawsuits is likewise necessary. However, courts may never hear cases that attorneys are reluctant to try because of the uniqueness of the issues involved.[235] Courts may never hear a dispute

235. O.C.G.A. § 9-15-14(c) (Supp. 1987) provides that statutory fees will not be assessed against a party when the court determines that a "good faith attempt to estab-

involving a plaintiff with a valid cause of action if the plaintiff is without the resources to absorb a potential tort damage claim or statutory sanctions. Also, courts will not hear cases in which a defendant settled for less than a fair amount, out of fear that his failure to do so would result in tort damages or statutory sanctions.

At the present, *Yost* and section 9-15-14 complement each other's goal of deterring groundless suits and compensating injured parties. There is, however, considerable overlap between the two which could cause inefficient uses of the court system. Should the Georgia General Assembly elect to retain section 9-15-14,[236] it could enhance both the new statute and the tort by amending the statute to provide for the resolution of the motion for attorney's fees simultaneously with the resolution of the tort claim. Otherwise, the statutory motion will neither deter frivolous abusive litigation claims, nor compensate abusive litigation defendants.

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lish a new theory of law" is evident. There is no corresponding limiting language in the *Yost* opinion. Additionally, the definition of "good faith" may vary with different courts and juries.

236. O.C.G.A. § 9-15-14(g) (Supp. 1987) provides that "[t]his Code section shall be repealed effective July 1, 1989."